STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2004
v	No. 242764 Berrien Circuit Court
MICHAEL DWAYNE BREWER, Defendant-Appellant.	LC No. 00-405015-FC

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 85 to 480 months' imprisonment on the armed robbery conviction and 2 years' imprisonment on the felony-firearm conviction. We affirm.

This case stems from the armed robbery of the Holiday Inn Express in New Buffalo Township. Defendant, along with two other individuals, entered the hotel lobby armed with a sawed-off shotgun and a handgun demanding that the clerk empty the contents of the cash register and safe into a garbage bag. After he complied, the clerk was tied up and defendant and his accomplices escaped.

On appeal, defendant first argues that he was denied the effective assistance of counsel. We disagree.

The right to effective assistance of counsel found in the Michigan Constitution is not different or greater than the protection found in the Sixth Amendment to the United States Constitution. *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994). Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed

> 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant presents a multitude of arguments which allegedly support a finding that trial counsel was ineffective. Defendant requests either a reversal of the convictions, or, alternatively, remand for a *Ginther*[1] hearing. This Court previously denied defendant's motion to remand for a *Ginther* hearing "for failure to persuade the Court of the necessity of a remand at this time." *People v Brewer*, unpublished order of the Court of Appeals, entered March 31, 2003 (Docket No. 242764).

Defendant claims that counsel was ineffective for failing to make an opening statement,[2] failing to call any witnesses for the defense, failing to call two hotel employees as witnesses, failing to develop a close and productive working relationship with defendant, failing to file any pretrial motions, and pressuring defendant not to take the stand in his own defense.

We see no need to reverse or remand, considering that defendant fails to explain, in any relevant or meaningful manner, how these alleged instances of ineffective assistance constituted unsound trial strategy and how they prejudiced his right to a fair trial. A review of defendant's two rambling affidavits does not shed any additional light on the matter. In fact, they tend to support a finding that counsel's decisions were a matter of sound trial strategy. Defendant states in one of the affidavits:

> [I] was not the leader and I didn't know what was going on until the robbery was in process. It wasn't a premeditated robbery and there was no such talk between myself and my co-defendants.

This statement implicates defendant as participating in the robbery. No wonder counsel advised defendant not to take the stand. The affidavit further provided:

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] The decision to give or not give an opening statement is a matter of trial tactics. *People v Hempton*, 43 Mich App 618, 624; 204 NW2d 684 (1972).

> I wanted [counsel] to call two employees who were at the Holiday Inn that night and made statements to the Michigan State Police that they couldn't identify the persons or people who were at the hotel the night of the robbery.

First, there are no affidavits from these alleged witnesses, nor a copy of any police document establishing the existence of the witnesses. Second, there is a complete lack of specificity as to the identity of these alleged witnesses, and where exactly they were in the hotel during the crime; the averment is extremely vague. Further, even if these witnesses testified as indicated, it would have added little, if anything, to defendant's case, and it would not have detracted from the clerk's identification. Defendant does not assert that the alleged witnesses could positively state that defendant was not one of the robbers. Defendant fails to show the existence of a reasonable probability that, but for counsel's errors, assuming errors, the result of the proceeding would have been different.

In light of the insufficient arguments and affidavits presented by defendant, he has failed to overcome the strong presumption that counsel's actions were a matter of sound trial strategy, nor has defendant established the necessary prejudice. Considering the woefully lacking assertions by defendant, we see no need to remand for elaboration in a *Ginther* hearing.

Defendant's next issue on appeal is that the trial court erred and abused its discretion in imposing the sentence. We disagree.

Defendant first argues that the court should have made a downward departure from the statutory guidelines in imposing the sentence. He cites *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), as standing for the proposition that the touchstone of sentencing is always proportionality, and therefore, even though the sentence may have been within the sentencing guidelines, it may nevertheless represent an abuse of discretion. Defendant argues the fact that (1) defendant had little contact with the criminal justice system before this incident, (2) defendant had steady employment since 1994 and obtained a GED in an adult education program, and that (3) defendant denied the use of any controlled/illegal substances, all make the imposed sentence, even though within the guidelines, disproportionate and represents an abuse of discretion by the trial court.

Defendant concedes that the sentence imposed by the trial court was within sentencing guidelines. Under MCL 769.34(10), this Court's power to reverse a sentence that is within the guidelines is limited to cases where there is error in scoring or inaccurate information relied upon in determination of the sentence. Because defendant is merely asking this Court to review his sentence for proportionality, this argument must fail because "this Court may not consider challenges to a sentence based exclusively on proportionality if the sentence falls within the guidelines." *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002).

Defendant's next claim is that a number of the facts relied upon by the court in scoring under the sentencing guidelines were erroneous. The Court has retained the authority to review this claim of error under the statute, MCL 769.34(10). The existence or nonexistence of a factor is a factual determination which should be reviewed by this Court for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Callon*, 256 Mich App 312, 321; 662 NW2d 501 (2003).

Defendant first states that it was clearly erroneous for the court to find that defendant had a short-barreled shotgun and not simply a regular shotgun. This raised his score on offense variable two (OV 2) from 5 to 10 points. MCL 777.32 provides for a ten point score where "[t]he offender possessed or used a . . . short-barreled shotgun" but only five points for a regular shotgun.

MCL 750.222(i) defines a short-barreled shotgun as "a shotgun having 1 or more barrels less than 18 inches in length or a weapon made from a shotgun, whether by alteration, modification, or otherwise, if the weapon as modified has an overall length of less than 26 inches." However, the gun was never offered into evidence, and in fact was never recovered. The court therefore relied on the testimony given by the hotel clerk who stated that "the Defendant came in through the doors here with a sawed-off shotgun . . . ."

Q. Describe the shotgun.

A. The shotgun was about – I don't know – it was maybe – maybe two feet long, maybe two and a half feet long. It was a dark shotgun.

Q. Could you tell if it was a normal size shotgun or was it . . . .

A. No. It was shorter than a normal size shotgun.

Q. Could you tell if it was cut or anything?

A. Yeah, it looked like it was a cut shotgun, well, in that it was shorter – the barrel was shorter than it was supposed to be, I would guess, for a shotgun.

We find this evidence sufficient to support the trial court's ruling that a short-barreled shotgun was used in the crime.

Next, defendant challenges the scoring of OV 14, offender's role – MCL 777.44, stating that there was insufficient evidence to conclude that defendant acted with any leadership, which required the addition of 10 points. The statute includes the instructions that "[i]f 3 or more offenders were involved, more than one offender may be determined to have been a leader." MCL 777.44(2)(b). The trial court concluded that there were "three participants and that the two men were the leaders." This finding is supported by the evidence by the testimony of the hotel clerk, who stated that the two men were the ones with the guns, and that they demanded the money, escorted him to the manager's office, and tied him up. When asked what role he thought the female played in the robbery, the clerk responded, "I don't know what the purpose was in her being there, but the role she seemed to play from my perspective was that of maybe a watch out . . . ." Accordingly, the trial court's finding here is not clearly erroneous.

Defendant's final contention is that the trial court erred when it scored prior record variable seven (PRV 7), subsequent or concurrent felony convictions – MCL 777.57. The trial court relied on information provided in the presentence report that defendant was convicted of theft/receipt of stolen property in the state of Indiana, and therefore added 10 points on his score. While defense counsel did not dispute this conviction at the hearing, she did argue that the offense was considered a "high Court misdemeanor." The prosecutor responded that defendant

was sentenced to serve a term in prison, to which the court responded, "ordinarily for misdemeanors you don't go to prison." The sentencing transcript reflects, without objection, that defendant was sentenced to "one year and six months in prison." MCL 761.1 of the Code of Criminal Procedure defines a felony, in part, as a crime punishable by imprisonment for more than one year. Accordingly, the finding that the conviction was for a felony is not erroneous.

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey